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Nos. 07-1428 and 08-328

IN THE

Supreme Court of the United States

FRANK RICCI ET AL., *Petitioners*,
v.
JOHN DESTEFANO ET AL., *Respondents*.

FRANK RICCI ET AL., *Petitioners*,
v.
JOHN DESTEFANO ET AL., *Respondents*.

On a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, AND LATINOJUSTICE PRLDEF AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

This brief will address the following questions:

1. Whether a public entity violates the Equal Protection Clause by abandoning a practice it has a strong basis in evidence to believe would violate Title VII.

2. Whether Title VII's proscription against business practices with an unjustified disparate impact is unconstitutional on the ground that it requires public employers to violate the Equal Protection rights of employees who benefit from the practices forbidden by the Act.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. Petitioners' Constitutional Arguments, If Accepted, Would Call Into Question The Constitutionality Of Title VII's Disparate Impact Provision As Applied To Public Employers. 4

II. Title VII's Proscription Against Practices With An Unjustified Disparate Impact Plays A Central Role In Enforcing The Nation's Commitment To Equal Employment Opportunity. 5

III. This Court Can And Should Resolve This Case Without Questioning The Constitutionality Of Title VII's Disparate Impact Provision. 11

A. Compliance With Title VII Is A Compelling State Interest. 11

B. Abandoning An Employment Test With A Prima Facie Disparate Impact Is A Narrowly Tailored Means To Achieving An Employer's Compelling Interest In Compliance With Title VII. 14

IV. Petitioners' Suggestion That Title VII Is Itself Unconstitutional Is Meritless. 21

A. Avoiding Disparate Impact Is Not A Form Of Racial Classification. 22

B. The Desire To Avoid An Unjustified Disparate Impact Is Not A Racially Discriminatory Purpose. 24

C. To The Extent That Avoiding Disparate Impact Is Seen As Race Conscious, Strict Scrutiny Nonetheless Does Not Apply. 27

CONCLUSION 38

TABLE OF AUTHORITIES

Cases

Adarand Constructors, Inc. v. Pena,
515 U.S. 200 (1995) 11, 30, 33

Albemarle Paper Co. v. Moody,
422 U.S. 405 (1975) 8, 9, 20

Alden v. Maine,
527 U.S. 706 (1999) 12

Bazemore v. Friday,
478 U.S. 385 (1986) (per curiam) 23

Brown v. Board of Education,
347 U.S. 483 (1954) 22

Bryan v. Koch,
627 F.2d 612 (2d Cir. 1980) 27

Bush v. Vera,
517 U.S. 952 (1996) ..... passim

Bushey v. N.Y. State Civil Serv. Comm'n,
733 F.2d 220 (2d Cir. 1984) 17

City of Boerne v. Flores,
521 U.S. 507 (1997) 36

City of Richmond v. J.A. Croson Co.,
488 U.S. 469 (1989) ..... passim

City of Rome v. United States,
446 U.S. 156 (1980) 13

Connecticut v. Teal,
457 U.S. 440 (1982) 8, 13, 26

Davis v. City and County of San Francisco,
890 F.2d 1438 (9th Cir. 1989) 17

Dothard v. Rawlinson,
433 U.S. 321 (1977) 10, 13

EEOC v. Shell Oil Co.,
466 U.S. 54 (1984) 20

EEOC v. Wyoming,
460 U.S. 226 (1983) 13

Ex parte Commonwealth of Virginia,
100 U.S. 339 (1879) 5

Fairbank v. United States,
181 U.S. 283 (1901) 12

Fitzpatrick v. Bitzer,
427 U.S. 445 (1976) 13

Gayle v. Browder,
352 U.S. 903 (1956) (per curiam) 22

Gomillion v. Lightfoot,
364 U.S. 339 (1960) 34

Griggs v. Duke Power Co.,
401 U.S. 424 (1971) 6, 7, 10, 11

Grutter v. Bollinger,
539 U.S. 306 (2003) 10, 31

Howard v. McLucas,
871 F.2d 1000 (11th Cir. 1989) 17

Hunter v. Underwood,
471 U.S. 222 (1985) 25, 34

In re: Employment Discrimination Litigation Against State of Ala.,
198 F.3d 1305 (11th Cir. 1999) 9

Int'l Bhd. of Teamsters v. United States,
431 U.S. 324 (1977) 8

Jean v. Nelson,
472 U.S. 846 (1985) 5

Johnson v. California,
543 U.S. 499 (2005) 22, 34

Johnson v. De Grandy,
512 U.S. 997 (1994) 17

Kimel v. Florida Board of Regents,
528 U.S. 62 (2000) 13

League of United Latin American Citizens v. Perry,
126 S. Ct. 2594 (2006) 12

Local No. 93, Int'l. Ass'n of Firefighters, AFL-CIO, C.F.C. v. City of Cleveland,
478 U.S. 501 (1986) 20

Locke v. Davey,
540 U.S. 712 (2004) 16

Loving v. Virginia,
388 U.S. 1 (1967) 22

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) 7

Miller v. Johnson,
515 U.S. 900 (1995) 14, 23, 24, 35

Monell v. New York City Dep't of Soc. Srvcs.,
436 U.S. 658 (1978) 13

Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle,
429 U.S. 274 (1977) 36

Nevada Dep't of Human Res. v. Hibbs,
538 U.S. 721 (2003) 13, 14

New York City Transit Auth. v. Beazer,
440 U.S. 568 (1979) 13

Parents Involved in Community Schools v. Seattle School District No. 1,
127 S. Ct. 2738 (2007) 22, 23, 30, 33

Personnel Admin. of Mass. v. Feeney,
442 U.S. 256 (1979) 25

Rogers v. Lodge,
458 U.S. 613 (1982) 34

Shaw v. Hunt,
517 U.S. 899 (1996) 12, 15, 30, 35

Shaw v. Reno,
509 U.S. 630 (1993) 12, 22

Tennessee v. Lane,
541 U.S. 509 (2004) 9, 14, 36

U.S. Postal Service Bd. of Governors v. Aikens,
460 U.S. 711 (1983) 8

United States v. Darby,
312 U.S. 100 (1941) 5

United Steelworkers of America, AFL-CIO-CLC v. Weber,
443 U.S. 193 (1979) 6

Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.,
429 U.S. 252 (1977) 24

Wards Cove Packing Co. v. Atonio,
490 U.S. 642 (1989) 9, 11

Washington v. Davis,
426 U.S. 229 (1976) 8, 28

Watson v. Fort Worth Bank & Trust,
487 U.S. 977 (1988) 9, 11, 18

Wygant v. Jackson Bd. of Educ.,
476 U.S. 267 (1986) ..... passim

Yu Cong Eng v. Trinidad,
271 U.S. 500 (1926) 24

Statutory and Constitutional Provisions

Civil Rights Act of 1964, Tit. VII, 42 U.S.C. § 2000e *et* seq. ..... passim
42 U.S.C. § 2000e-2(j) 35
42 U.S.C. § 2000e-2(k) 18, 35
42 U.S.C. § 2000e-2(k)(1)(A)(i) 7, 8
42 U.S.C. § 2000e-2(k)(1)(A)(ii) 8
42 U.S.C. § 2000e-2(k)(1)(C) 8
42 U.S.C. § 2000e-2(l) 19, 35
U.S. CONST. amend. XIV ..... passim
Equal Protection Clause ..... passim
§ 5 ..... 5, 36
U.S. CONST., art. I, § 8 ..... 5, 12, 13

Other Authorities

110 CONG. REC. 6, 7204 (1964) 6
Andrew M. Carlon, *Racial Adjudication*, 2007 B.Y.U. L. REV. 1151 23
Danielle Holley & Delia Spencer, *The Texas Ten Percent Plan*, 34 HARV. C.R.-C.L. L. REV. 245 (1999) 30
Robert H. Olson, Jr., *Employment Discrimination Litigation: New Priorities in the Struggle for Black Equality*, 6 HARV. C.R.-C.L. L. REV. 20 (1970) 6
REPORT OF THE INDEPENDENT COMMISSION OF THE LOS ANGELES POLICE DEPARTMENT 10

U.S. CENTERS FOR DISEASE CONTROL AND PREVENTION, FACT SHEET: RACIAL/ETHNIC HEALTH DISPARITIES (2004), *available at* http://www.cdc.gov/od/oc/media/pressrel/fs040402 .htm 27

U.S. CTRS. FOR DISEASE CONTROL & PREVENTION, OFFICE OF MINORITY HEALTH & HEALTH DISPARITIES, ELIMINATING RACIAL & ETHNIC HEALTH DISPARITIES, available at http://www.cdc.gov/omhd/About/disparities.htm 29

U.S. Ctrs. for Disease Control & Prevention, *Racial Disparities in Nationally Notifiable Disease—United States, 2002*, MORBIDITY AND MORTALITY WEEKLY REPORT, Jan. 14, 2005, *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5401a4.htm 29

U.S. DEP'T OF HEALTH AND HUMAN SERVS., HEALTH RES. AND SERVS. ADMIN., ADDRESSING RACIAL AND ETHNIC DISPARITIES IN THE CONTEXT OF MEDICAID MANAGED CARE: A SIX-STATE DEMONSTRATION PROJECT (2004), *available at* ftp://ftp.hrsa.gov//financeMC/HRSA-Disparities-in-MC-Report.pdf 29

U.S. SENTENCING COMMISSION, REPORT TO THE CONGRESS, COCAINE AND FEDERAL SENTENCING POLICY (May 2007) 28

INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit and nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. In particular, the ACLU has appeared before this Court in numerous cases involving the interpretation of Title VII and the scope of the Equal Protection Clause, both as direct counsel and as amicus curiae.

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national civil rights organization established in 1968. Its principal objective is to promote the civil rights of Latinos living in the United States through litigation, advocacy and education. MALDEF's mission includes a commitment to ensure equal employment opportunities for Latinos. MALDEF has represented Latino and minority interests in civil rights cases in federal courts throughout the nation. During its 40-year history, MALDEF has litigated numerous employment discrimination cases on behalf of Latino employees.

LatinoJustice PRLDEF is an independent national nonprofit civil rights organization which has

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[1] Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Petitioners and respondents have filed letters of consent with the Clerk of the Court.

advocated for and defended the constitutional rights and the equal protection of all Latinos under law. Founded in 1972, the organization's mission is to promote the civic participation of the pan-Latino community, to cultivate Latino community leaders, and to bring impact litigation addressing voting rights, employment opportunity, fair housing, language rights, educational access, immigrants' and migrants' rights. During its 37-year history, LatinoJustice PRLDEF has litigated numerous employment discrimination cases on behalf of Latino and Latina employees.

SUMMARY OF ARGUMENT

In some ways, this case appears to present a narrow question regarding the application of Title VII and the Equal Protection Clause to a particular employment practice by one public employer in the State of Connecticut. However, the arguments petitioners make in favor of their position raise broader issues of surpassing significance. In fact, if accepted, petitioners' constitutional arguments would draw into question the constitutionality of Title VII's disparate impact provision, and perhaps require its invalidation as applied to public employers—if not here, then in a subsequent case.

In particular, petitioners assert that an employer violates the Equal Protection Clause if it abandons an employment practice because it fears the practice causes an unjustified disparate impact on minorities. Although petitioners are careful not to say so directly, the natural consequence of such reasoning is the conclusion that by requiring such action, Title VII's disparate impact provision is itself incompatible

with the Equal Protection Clause, at least in cases involving public employment.

For this Court to strike down, or even call into question, Title VII's disparate impact provision would be a momentous decision, with grave consequences for the nation's continuing efforts to ensure equal access to employment opportunities. Consistent with traditional principles of constitutional avoidance, however, the Court can and should resolve petitioners' constitutional claims on narrower grounds. Specifically, the Court should hold that respondents' efforts to comply with Title VII would survive even the strictest level of Equal Protection scrutiny.

This Court has assumed in the past that compliance with a presumptively valid federal statute is a compelling state interest. Because petitioners do not openly challenge Title VII's validity, this Court should assume that acting to comply with its mandates similarly constitutes a compelling state interest. And because respondents had a strong basis in evidence to believe that their actions were necessary to comply with Title VII's disparate impact provision, the Court should hold that their actions were narrowly tailored to serve that compelling interest.

But to the extent that the Court ventures into uncharted constitutional waters, it should confirm that neither Title VII, nor public employers' efforts to comply with it, violate the constitutional rights of employees who benefit from practices that have a disparate impact on protected classes of workers. Such action is not tantamount to intentional race discrimination against the beneficiaries of the

discriminatory practice. And to the extent it is even considered race conscious to a degree, it is the kind of race-conscious conduct that this Court has suggested—and, if necessary in this case, should now hold—does not warrant strict scrutiny.

ARGUMENT

I. Petitioners' Constitutional Arguments, If Accepted, Would Call Into Question The Constitutionality Of Title VII's Disparate Impact Provision As Applied To Public Employers.

Although petitioners do not directly ask this Court to declare Title VII's disparate impact provision unconstitutional as applied to public employers, that conclusion is the fair implication of their constitutional arguments in this case.

Even though petitioners allege that respondents' conduct violated both Title VII and the Constitution, they ignore traditional constitutional avoidance principles and assert first and foremost that respondents' attempt to comply with Title VII violates the Equal Protection Clause, on grounds that imply Title VII's unconstitutionality. *See* Petr. Br. 21-43. First, they assert that in acting to avoid a disparate impact on minorities, a public employer engages in "race-based action," akin to intentional discrimination, which is "subject to strict scrutiny." *Id.* at 23. Next, they argue that "avoiding disparate-impact liability can never be a compelling state interest that could justify intentional racial discrimination," *id.* at 33, even if required by Title VII, *id.* at 29 ("[A]voiding Title VII disparate-impact

claims cannot justify intentional race-based disparate treatment."). As a consequence, petitioners argue, New Haven violated the Equal Protection Clause, even if it was simply attempting in good faith to comply with Title VII's disparate impact requirements. *See id*. at 29-33.

A seemingly necessary consequence of accepting this line of argument is that Title VII's disparate impact provision violates the Equal Protection Clause as applied to public employers. If avoiding disparate impact is unconstitutional discriminatory state action, then Title VII may not require public employers to engage in it. Although Congress has broad powers under the Commerce Clause and Section 5 of the Fourteenth Amendment, it must exercise those powers consistent with the other commands of the Constitution. *See*, *e.g.*, *Ex parte Commonwealth of Virginia*, 100 U.S. 339, 345-46 (1879) (Congress's power to enforce the Fourteenth Amendment includes power to enact "[w]hatever legislation is appropriate . . . *if not prohibited*" by the Constitution) (emphasis added); *United States v. Darby*, 312 U.S. 100, 115-16 (1941) (same for Commerce Clause).

II. Title VII's Proscription Against Practices With An Unjustified Disparate Impact Plays A Central Role In Enforcing The Nation's Commitment To Equal Employment Opportunity.

This Court does not lightly call into question the constitutionality of any act of Congress. *See*, *e.g.*, *Jean v. Nelson*, 472 U.S. 846, 854 (1985). The Court should be especially hesitant to question the

constitutionality of Title VII's disparate impact provision, which has long served a critical function as an essential part of one of the nation's most important civil rights laws.

1. Congress enacted Title VII as part of the Civil Rights Act of 1964 in light of overwhelming evidence of pervasive inequality in the American job market, inequality that grew out of generations of resistance to opening the nation's economic opportunities to all citizens, regardless of race, religion, color, or sex. *See*, *e.g.*, *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193, 202 (1979) (discussing legislative history); Robert H. Olson, Jr., *Employment Discrimination Litigation: New Priorities in the Struggle for Black Equality*, 6 HARV. C.R.-C.L. L. REV. 20, 22-29 (1970).

Congress recognized that dismantling the racially stratified employment market was a critical step to achieving broader economic and social equality. In a society with a market economy, in which many fundamental opportunities—including the ability to attend college, receive medical care, buy a house, start a business, and run for political office—depend in no small measure on wealth and income, equal access to well-paying jobs was a necessary first step to eradicating the continuing legacy of discrimination condoned and even sponsored by the government over generations. *See*, *e.g.*, *Weber*, 443 U.S. at 202-03; 110 CONG. REC. 6, 7204, 7379 (1964).

To achieve this purpose, Congress proscribed both practices proven to be intentionally discriminatory and those that were "fair in form, but discriminatory in operation." *Griggs v. Duke Power*

Co., 401 U.S. 424, 431 (1971). Congress and this Court recognized that some employment practices and tests, "however neutral on their face, operated to exclude many blacks who were capable of performing effectively in the desired positions." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 806 (1973). Regardless of whether the barriers were intentional, Congress concluded that they must be removed to ensure that the promise of equal employment opportunity was not simply a slogan, but in fact became reality.

At the same time, Congress did not intend Title VII to require "that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group." *Griggs*, 401 U.S. at 430-31. Instead, Congress in Title VII required only the removal of "*artificial, arbitrary, and unnecessary* barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification[s]." *Id*. at 431 (emphasis added). Accordingly, Title VII's disparate impact test has developed in the Court's cases, and eventually was codified by Congress, in a way that balances employers' interest in ensuring a highly qualified workforce and the national interest in promoting equal employment opportunity.

Thus, to make a prima facie claim of unlawful racially disparate impact, a plaintiff must demonstrate that the employer "uses a particular employment practice that causes a disparate impact on the basis of race." 42 U.S.C. § 2000e-2(k)(1)(A)(i). When this showing is made, the burden then shifts to the defendant, who must justify the disparate result

by "demonstrat[ing] that the challenged practice is job related for the position in question and consistent with business necessity." *Id*. The plaintiff may overcome that showing by demonstrating that the proffered business justification is pretextual. *Id*.; *see also Connecticut v. Teal*, 457 U.S. 440, 446-47 (1982). Pretext can be inferred when a plaintiff identifies an equally effective alternative practice with a lesser disparate impact that the employer refuses to adopt. *See* 42 U.S.C. §§ 2000e-2(k)(1)(A)(ii), (C); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 436 (1975).

2. The disparate impact cause of action thus described serves an essential role in fulfilling the promise of equal employment opportunity.

a. First, the theory acts as a prophylactic measure to ensure that discrimination founded in unspoken racial bias does not escape detection and remedy. "There will seldom be 'eyewitness' testimony to the employer's mental processes." *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983). As a result, "[f]requently the most probative evidence of intent will be objective evidence of what actually happened." *Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring). Disparate impact analysis serves to identify a class of practices that may have their genesis in intentional discrimination, yet would escape remedy if the employer's intent had to be proven. Indeed, this Court has recognized that the disparate effect of an employment practice is probative evidence of discriminatory intent. *See*, *e.g.*, *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339-40 & n.20 (1977).

That inference of intentional discrimination is strengthened if the employer cannot show that the practice serves, in a significant way, a legitimate business purposes. *See In re: Employment Discrimination Litigation Against State of Ala.*, 198 F.3d 1305, 1321-22 (11th Cir. 1999). Moreover, even when a practice serves a legitimate purpose, the employer's refusal to adopt an equally effective but less discriminatory alternative "would belie a claim by [the employer] that [its] incumbent practices are being employed for nondiscriminatory reasons," *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 660-61 (1989), and provide "evidence that the employer was using its tests merely as a 'pretext' for discrimination," *Albemarle Paper*, 422 U.S. at 425.[2]

To be sure, not every practice with an unlawful disparate impact is actually motivated by intentional race discrimination. But Congress could reasonably conclude that the prophylactic aspect of the test was necessary to ensure fully effective enforcement of the basic prohibition against intentional discrimination. *See Tennessee v. Lane*, 541 U.S. 509, 520 (2004).

b. Disparate impact analysis further promotes the goal of equal economic opportunity by removing unnecessary barriers to employment and advancement, some of which risk "freez[ing] the

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[2] In addition, "even if one assumed that [conscious intentional discrimination] can be adequately policed through disparate treatment analysis, the problem of subconscious stereotypes and prejudices would remain." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988).

status quo of prior discriminatory employment practices." *Griggs*, 401 U.S. at 430.

Even when employers do not intend to restrict employment opportunities for women and minorities, they may sometimes use—for no good reason—practices which have that effect. *See*, *e.g.*, *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (prison imposed height and weight requirements for guards, which excluded most women, instead of directly measuring strength or other characteristics relevant to the job). The removal of such barriers not only benefits those unnecessarily excluded, but often the employer and the national economy as well. *See*, *e.g.*, REPORT OF THE INDEPENDENT COMMISSION OF THE LOS ANGELES POLICE DEPARTMENT 83 (1991) (noting that bias against female police officers "depriv[ed] the Department of specific skills, and thereby contribut[ed] to the problem of excessive force").

At the same time, this process instills greater community confidence in the fairness of public employment practices, and as a consequence, the legitimacy of the government itself. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 290 (1986) (O'Connor, J., concurring); *cf. also Grutter v. Bollinger*, 539 U.S. 306, 332 (2003) ("In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.").

III. This Court Can And Should Resolve This Case Without Questioning The Constitutionality Of Title VII's Disparate Impact Provision.

This Court has repeatedly endorsed Title VII's disparate impact analysis, without ever questioning its constitutionality. *See*, *e.g.*, *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). There is no reason to do so for the first time here. Instead, this Court can, and should, resolve petitioners' Equal Protection challenge on narrow grounds by holding that respondents' conduct survives even the strictest level of Equal Protection scrutiny. *A fortiori*, respondents' conduct necessarily survives the lower level of scrutiny that respondents persuasively argue should apply here.[3]

A. Compliance With Title VII Is A Compelling State Interest.

In order to satisfy strict scrutiny, a public employer must show that the action taken was "narrowly tailored" to achieve a "compelling government interest." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). Contrary to petitioners' suggestion (Petr. Br. 28), this Court has repeatedly assumed that compliance with presumptively valid federal antidiscrimination law is

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[3] As discussed in Section IV of this brief, *amici* agree with respondents that strict scrutiny does *not* apply either to Title VII or to respondents' efforts to comply with it.

a compelling state interest.[4] That assumption is well-founded and should be applied in this case as well.

1. Under the Supremacy Clause, no state has the right "to disregard the Constitution or valid federal law." *Alden v. Maine*, 527 U.S. 706, 754-55 (1999). And because acts of Congress are presumed to be constitutional, *Fairbank v. United States*, 181 U.S. 283, 285 (1901), public employers may act to comply with federal civil rights laws unless and until a court declares them unconstitutional. As several members of this Court have recognized, "it would be irresponsible for a State to disregard" a presumptively valid federal law. *Bush v. Vera*, 517 U.S. 952, 990-92 (1996) (O'Connor, J., concurring); *see also League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594, 2668 (2006) (Scalia, J., concurring in the judgment in part and dissenting in part) (concluding that a State should not be "placed in the impossible position of having to choose between compliance with [federal law] and compliance with the Equal Protection Clause").

There is no reason to apply a different presumption here. Petitioners do not, and cannot, question that Title VII constitutes a valid exercise of Congress's power under the Commerce Clause, as

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[4] *See*, *e.g.*, *Bush v. Vera*, 517 U.S. 952, 977 (1996); *Shaw v. Hunt*, 517 U.S. 899, 915 (1996); *Shaw v. Reno*, 509 U.S. 630, 656 (1993). Moreover, as respondents demonstrate (Resp. Br. 52-53), a majority of the members of this Court have affirmatively embraced the proposition that compliance with the Voting Rights Act constitutes a compelling state interest.

applied to both private and public employers. *See EEOC v. Wyoming*, 460 U.S. 226 (1983) (Age Discrimination in Employment Act as applied to public employers held to be constitutional exercise of Commerce Clause authority). Likewise, this Court has never questioned that Title VII's application to public employers constitutes a valid exercise of Congress's power to enforce the Fourteenth Amendment.[5] *See*, *e.g.*, *Connecticut v. Teal*, 457 U.S. 440 (1982); *New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979); *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).[6]

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[5] Whether Title VII's disparate impact provision constitutes appropriate legislation to enforce the Fourteenth Amendment is a question of no ultimate consequence in this case. As noted above, the provision is indisputably proper Commerce Clause legislation. Whether it is also valid Fourteenth Amendment legislation is relevant only with respect to the validity of Title VII's abrogation of State sovereign immunity. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976); *Kimel v. Florida Board of Regents*, 528 U.S. 62, 80 (2000). But that question does not arise in this case because respondent, as a municipal employer, enjoys no such sovereign immunity. *Monell v. New York City Dep't of Soc. Srvcs.*, 436 U.S. 658 (1978).

[6] The Court in *Fitzpatrick* upheld Congress's abrogation of state sovereign immunity to Title VII claims as a valid exercise of its enforcement powers under the Fourteenth Amendment. 427 U.S. at 456; *see also Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 729-30 (2003) ("[H]ere, as in *Fitzpatrick*, the persistence of such unconstitutional discrimination by the States justifies Congress' passage of prophylactic § 5 legislation."); *City of Rome v. United States*, 446 U.S. 156, 179 (1980) (reading *Fitzpatrick* as holding that the extension of Title VII to public employers "was an appropriate method of enforcing the Fourteenth Amendment").

The fact that Title VII prohibits disparate impact as well as disparate treatment does not undermine that conclusion. "When Congress seeks to remedy or prevent unconstitutional discrimination, § 5 authorizes it to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause." *Tennessee v. Lane*, 541 U.S. 509, 520 (2004); *see also Hibbs*, 538 U.S. at 737-38.

To be sure, as noted above, petitioners suggest that Title VII's disparate impact provision impermissibly trenches upon the Equal Protection rights of white workers who benefit from the forbidden disparate impact. Petr. Br. 23, 28, 33. But such innuendo is insufficient to call into question the constitutionality of an Act of Congress. Accordingly, this Court should proceed on its ordinary presumption that acts of Congress are assumed constitutional and that compliance with such laws is a compelling governmental interest.

B. Abandoning An Employment Test With A Prima Facie Disparate Impact Is A Narrowly Tailored Means To Achieving An Employer's Compelling Interest In Compliance With Title VII.

A public employer's action is narrowly tailored to serve its compelling interest of complying with Title VII if the action is "reasonably necessary" to comply with the statute. *See Vera*, 517 U.S. at 977; *Miller v. Johnson*, 515 U.S. 900, 921 (1995). An action is reasonably necessary if the employer has a "strong basis in evidence" for concluding that implementing

the employment practice would violate Title VII. *See, e.g.*, *Vera*, 517 U.S. at 977. In the context of avoiding disparate impact, a public employer has a strong basis in evidence when the results of an employment practice would be sufficient to establish a prima facie case of disparate impact discrimination. Requiring a greater showing is unnecessary to protect the rights of non-minority employees, would unduly burden public employers, and could discourage voluntary compliance with Title VII.

1. In the contexts of voting and affirmative action, this Court has held that the State acts in accordance with its compelling interest in complying with federal law if it has a "strong basis in evidence for concluding that" its actions were "reasonably necessary to comply" with federal law, *Vera*, 517 U.S. at 977 (voting); *see also Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996) (voting), or to remedy past discrimination, *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (affirmative action). The same basic standard should apply here as well.

The drafters of the Constitution understood that for governments to function, they must have some leeway to operate without the perpetual risk of being subject to litigation and judicial supervision regardless of what they do. Accordingly, strict scrutiny does not compel a public entity to ignore the disparate impact of its employment practices unless and until it is absolutely clear that action is necessary to avoid violating federal law. *See*, *e.g.*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 519 (1989) (Kennedy, J., concurring) (noting that "it diminishes the constitutional responsibilities of the

political branches to say that they must wait to act until ordered to do so by a court").

Thus, in the First Amendment context, the Court has recognized the need to construe states' obligations under the competing demands of the Establishment and Free Exercise Clauses in a way that ensures that "there is room for play in the joints . . . [i]n other words, there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." *Locke v. Davey*, 540 U.S. 712, 718-19 (2004) (internal citation omitted).

Likewise, the Equal Protection Clause cannot be reasonably construed to place government entities in an impossible bind "between the competing hazards of liability to minorities if [action] *is not* taken to remedy apparent employment discrimination and liability to nonminorities if [action] *is* taken." *Wygant*, 476 U.S. at 291 (O'Connor, J., concurring) (emphasis in original). Instead, the "'narrow tailoring' requirement of strict scrutiny allows the States a limited degree of leeway." *Vera*, 517 U.S. at 977.

2. A public entity that abandons an employment practice in order to comply with Title VII has a "strong basis in evidence" for doing so when the results of that employment practice would support a prima facie case of disparate impact discrimination.

This Court has repeatedly indicated that a prima facie case establishes the "strong basis in evidence" needed to satisfy strict scrutiny. In *Vera*, 517 U.S. 952, for example, the Court held that a state may take race-conscious action to comply with the Voting

Rights Act so long as it has a "'strong basis in evidence' for finding that the *threshold* conditions of § 2 liability are present," *id*. at 978 (listing three so-called *Gingles* factors), even though proof of an actual violation of Section 2 requires more, *see Johnson v. De Grandy*, 512 U.S. 997, 1011-12 (1994) (noting that proof of *Gingles* factor is not enough to establish liability). Likewise, in the affirmative action context, the Court has suggested that a prima facie case of discrimination by a public entity would provide a "strong basis in evidence" to support race-based remedial action. *See Croson*, 488 U.S. at 500; *see also id*. at 509 (plurality opinion) (indicating that a public entity is entitled to take race-conscious remedial action on the basis of a "significant statistical disparity" that gives rise to "an inference of discriminatory exclusion"); *Wygant*, 476 U.S. at 292 ("[D]emonstrable evidence of a disparity . . . sufficient to support a prima facie Title VII pattern or practice claim by minority [employees] would lend a compelling basis for a competent authority . . . to conclude that [voluntary action] is appropriate.") (O'Connor, J., concurring).[7]

So too, in this context, a prima facie case of disparate impact—*i.e.*, evidence showing that the specific employment practice has a substantial

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[7] *See also Howard v. McLucas*, 871 F.2d 1000 (11th Cir. 1989) (prima facie case of disparate impact constitutes "strong basis in evidence"); *Davis v. City and County of San Francisco*, 890 F.2d 1438, 1442-44, 1446-47 (9th Cir. 1989) (same); *Bushey v. N.Y. State Civil Serv. Comm'n*, 733 F.2d 220, 228 (2d Cir. 1984) (same).

disparate impact on a protected class of workers, *see* 42 U.S.C. § 2000e-2(k)—provides an employer with a strong basis in evidence to conclude that action is required to further its interest in compliance with Title VII.

3. Requiring employers to go further, as petitioners suggest (Petr. Br. 33), and determine whether the foregone test is consistent with business necessity, or susceptible of equally effective alternatives, is unwarranted for at least three reasons.

First, a stronger showing is not required to protect the rights of non-minority employees. Demonstrating a prima facie case is not an insignificant requirement. It is not enough, for example, "to show that there are statistical disparities in the employer's work force." *Watson*, 487 U.S. at 994. Instead, the employer must also "isolat[e] and identify[] the specific employment practices that are allegedly responsible for any observed statistical disparities," using "statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." *Id.* at 994-95.

In addition, Congress has pervasively regulated what steps an employer may take to voluntarily comply with the Act's disparate impact provisions, thereby guarding against the risk that employers will go too far in seeking to comply with federal law and unduly infringe upon the rights of innocent third parties. For example, Title VII prohibits employers from using compliance with the Act's disparate treatment provision as a pretext for intentionally

discriminating against individuals on the basis of race. *See* U.S. Br. 15-18. Moreover, the Act prohibits employers from remedying disparate impact by adjusting test scores, using different cutoff scores, or otherwise altering the results of employment tests on the basis of race. 42 U.S.C. § 2000e-2(l). As a result, employers are generally confined to responding to the risk of disparate impact by replacing a suspect employment test or practice with another, less discriminatory one. As discussed next, such action does not risk the same kind of serious harm occasioned by racial quotas or other kinds of racial classifications that impose significant burdens on particular individuals because of their race. *See infra* at 22-24, 32-34. This lesser degree of potential harm undermines any claim that the demands of strict scrutiny require a higher showing by employers before they may undertake voluntary action to comply with Title VII.

Second, requiring employers to conduct validation studies of every employment practice they chose to forgo would be costly for employers and, ultimately, taxpayers. The costs are magnified by the frequency with which employers must make decisions that are subject to Title VII's disparate impact standard. States engage in redistricting once a decade; state employers choose and administer tests, develop hiring criteria, and modify the rules of promotion and benefit systems all the time. The constitutional standard must take into account states' interest in effective and efficient management of their workforces.

Third, petitioners' stricter standard would inevitably produce greater uncertainty and,

therefore, more litigation. Whether a test produces a disparate impact sufficient to state a prima facie case is relatively easy to determine and provides a bright-line rule against which employers can act with a high degree of confidence that their actions are constitutional and not subject to reasonable dispute. A test that asks, in addition, whether the foregone test was consistent with business necessity, and whether the alternative chosen is "equally effective," draws a less certain line.

Finally, such uncertainty would "severely undermine public employers' incentive to meet voluntarily their civil rights obligations." *Wygant*, 476 U.S. at 290 (O'Connor, J., concurring). This Court has recognized the value of encouraging employers "to self-examine and self-evaluate their employment practices" in order to bring themselves into compliance with federal law. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975) (citation omitted); *see also Local No. 93, Int'l. Ass'n of Firefighters, AFL-CIO, C.F.C. v. City of Cleveland*, 478 U.S. 501, 515 (1986); *EEOC v. Shell Oil Co.*, 466 U.S. 54, 77 (1984). Such voluntary compliance is not only the most expedient means to achieving Title VII's ends, but it also obviates the need for employees to undertake the difficulty and expense of litigation to vindicate their civil rights. Moreover, voluntary compliance has intrinsic importance of its own, "both because of the example its voluntary assumption of responsibility sets and because the remediation of governmental discrimination is of unique importance." *Wygant*, 476 U.S. at 290 (O'Connor, J., concurring). All of these values are undermined by a standard that increases the costs, and risks,

associated with seeking to comply with Title VII's disparate impact requirement without resort to litigation.

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For the reasons set forth in respondents' brief, New Haven had ample evidence to conclude that its prior employment test had a sufficiently disparate impact on African-American employees to establish a prima facie case under Title VII. *See* Resp. Br. 54-55. Accordingly, refusing to certify the results of the test was a narrowly tailored means of furthering respondents' compelling interest in complying with Title VII.

IV. Petitioners' Suggestion That Title VII Is Itself Unconstitutional Is Meritless.

For the reasons just stated, the Court can and should resolve petitioners' constitutional claims without addressing the constitutionality of Title VII's disparate impact provision or petitioners' underlying constitutional arguments that could draw the Act's constitutionality into question. If, however, the Court undertakes to decide the proper level of constitutional scrutiny for government efforts to avoid disparate impact, it should reject petitioners' claim that strict scrutiny applies and its implicit suggestion that Title VII is itself unconstitutional.

Avoiding disparate impact is not tantamount to intentional racial discrimination against the group that disproportionately benefits from the abandoned practice. Forsaking a suspect employment test does not classify individual employees for disparate treatment on the basis of their race. Nor is it a facially neutral practice undertaken for a racially

discriminatory purpose. Moreover, even if the Court considered avoiding disparate impact to be race conscious to some degree, it is not the kind of race-based conduct that warrants strict scrutiny.

A. Avoiding Disparate Impact Is Not A Form Of Racial Classification.

Strict scrutiny is generally reserved for government acts that explicitly classify individuals on the basis of their race and subject them to differential treatment on the basis of that classification. *See*, *e.g.*, *Brown v. Board of Education*, 347 U.S. 483 (1954) (school segregation on the basis of race); *Gayle v. Browder*, 352 U.S. 903 (1956) (per curiam) (segregated seating on public buses); *Loving v. Virginia*, 388 U.S. 1 (1967) (miscegenation law). The Court has frequently referred to such practices as employing a "racial classification." *See*, *e.g.*, *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738, 2751-52 (2007); *Johnson v. California*, 543 U.S. 499, 505-06 (2005); *Shaw v. Reno*, 509 U.S. 630, 642-43 (1993).

Racial classification—that is, "[r]eduction of an individual to an assigned racial identity for differential treatment"—is "among the most pernicious actions our government can undertake," *Parents Involved*, 127 S. Ct. at 2796 (Kennedy, J., concurring), because both the racial designation and the differential treatment on the basis of the designation cause distinct and serious harms. "To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society." *Id*. at 2797 (Kennedy, J., concurring) (Kennedy, J., concurring). Accordingly, the act of

racial designation alone can risk stigmatic injury, causing harm to the individual and society at large. *See*, *e.g.*, *id.*; *Miller v. Johnson*, 515 U.S. 900, 911-12 (1995). In addition, state action on the basis of that designation generally inflicts significant and unfair practical harm as well. *See*, *e.g.*, *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 283-84 (1986) (plurality opinion) (loss of job); *Bazemore v. Friday*, 478 U.S. 385, 388 & n.1 (1986) (per curiam) (diminished pay). And the unfair distribution of government burdens and benefits can lead to divisiveness, resentment, and racial polarization. *See*, *e.g.*, *Parents Involved*, 127 S. Ct. at 2796 (Kennedy, J., concurring).

A decision not to implement a test with a suspected disparate impact is a facially neutral act that does not classify workers for disparate treatment on the basis of race. First, choosing one test over another is facially neutral. While the employer may look at aggregate racial statistics to determine whether the test has a disparate impact,[8] it does not label individuals for race-specific treatment, as occurs when the state engages in a traditional racial classification. Second, and as a result, the employer does not treat individuals differently on the basis of their race. To the contrary, whatever test is eventually chosen will be provided to all employees,

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[8] The collection of racial data for aggregate analysis does not constitute a racial classification within the meaning of this Court's cases. Merely gathering information does not risk the kind of stigmatizing injury, racial polarization, or subsequent race-based treatment that warrants the special skepticism of strict scrutiny. *See generally* Andrew M. Carlon, *Racial Adjudication*, 2007 B.Y.U. L. REV. 1151.

and each will be treated equally in accordance with the results. Moreover, it is impossible to say in advance whether any given individual will do better or worse under any particular test. Some in the previously benefited group will be disadvantaged by the change, while others in the group will benefit even more from it. In short, the change in procedure does not single out for differential treatment any individual because of his race.

B. The Desire To Avoid An Unjustified Disparate Impact Is Not A Racially Discriminatory Purpose.

That respondents' conduct was facially neutral does not end the inquiry, of course. As discussed in the next section, *see infra* at 27-37, strict scrutiny is sometimes applied to government action that, "though race neutral on [its] face," is "motivated by a racial purpose or object." *Miller*, 515 U.S. at 913; *see also Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977).[9] But this principle has no application here because acting to comply with Title VII, and to avoid an unnecessary disparate impact, is not an act "motivated by a racial purpose or object." *Id*.

Strict scrutiny applies to government action that is neutral on its face, but intended to achieve a particular racial result. *See*, *e.g.*, *City of Richmond v.*

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[9] Thus, discrimination on the basis of language or immigration status, for example, is subject to strict scrutiny if shown to be used as a proxy for race or national origin. *See*, *e.g.*, *Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926).

J.A. Croson Co., 488 U.S. 469, 477-78 (1989) (city ordinance requiring thirty-percent minority contractor set-aside); *Hunter v. Underwood*, 471 U.S. 222 (1985) (statute intended to maximize disenfranchisement of African Americans). Title VII's disparate impact provision is different: while it requires an employer to be aware of the racial outcome of its practices, the provision's purpose is not to achieve any particular racial result, but rather to ensure a fair and accurate process for distributing employment opportunities, consistent with the legitimate interests of business owners.

An employer that seeks to ensure that its processes are neutral in both intent and effect does not act with the kind of racial purpose that invokes strict scrutiny. *See Personnel Admin. of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (intentional discrimination requires that "the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group").[10] Title

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[10] Consider, for example, an employer that orders its supervisors to assign overtime-assignment opportunities at random, but discovers that African-American employees are being given overtime opportunities in substantial disproportion to their numbers. The employer would have reason to believe that the random selection process was not working properly, and could reasonably decide to replace it with a system of rotating assignments. In so doing, the employer would be aware that the predictable effect would be the reduction of overtime pay for African-American employees on average. But that would not mean that it took that action "because of" any worker's race. *See Feeney*, 442 U.S. at 279. Moreover, this would be true even if the employer could have, but chose not to,

VII's disparate impact provision is directed at ensuring the fairness and legitimacy of employment tests, not at achieving any particular racial outcome. Congress sought merely to "achiev[e] equality of employment *opportunities* and remov[e] barriers to such equality"; it did not intend to require any "overall number of minority or female applicants actually hired or promoted." *Connecticut v. Teal*, 457 U.S. 440, 449-50 (1982) (internal quotation marks and citations omitted) (emphasis added). To that end, Title VII does not require employers to use practices that achieve any specific racial result—so long as the practice is job-related, and does not have an unnecessary disparate impact, it may be used even if it results in the complete exclusion of minority employees. At the same time, an employer is under no compulsion to choose a test that *maximizes* minority success—all Title VII requires is that the test not unnecessarily disadvantage minority workers.

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conduct a statistical analysis to determine whether the disparate results it observed were consistent with the normal variations in a random process. So long as the employer acts out of a concern about the validity of its assignment process, and not to achieve any particular racial result, it does not act with the kind of racial purpose that invokes strict scrutiny.

C. To The Extent That Avoiding Disparate Impact Is Seen As Race Conscious, Strict Scrutiny Nonetheless Does Not Apply.

Even if avoiding disparate impact were seen as race conscious to a degree, this minimal consideration of race does not warrant strict scrutiny.

1. Almost all facially neutral government action has the potential to affect racial or other groups differently. The decision to increase government funding for treatment of one disease, rather than another, can have disparate effects on the basis of race or sex. *See* U.S. CENTERS FOR DISEASE CONTROL AND PREVENTION, FACT SHEET: RACIAL/ETHNIC HEALTH DISPARITIES (2004), *available at* http://www.cdc.gov/od/oc/media/pressrel/fs040402.htm. Where to build a school, or whether to close a particular community hospital, will often affect one racial or ethnic group disproportionately in light of residential segregation in our neighborhoods. *See, e.g.*, *Bryan v. Koch*, 627 F.2d 612 (2d Cir. 1980) (discussing a hospital closing in Harlem). For the same reason, the location of undesirable facilities (such as landfills and power stations) or the allocation of resources to remediate environmental hazards will frequently have a racially disparate effect. And, as illustrated by this case, the choice of an employment test or practice can often have a disparate impact on the ability of women and minorities to obtain or advance in employment.

This Court has recognized that public entities are not required by the Constitution to take such considerations into account: the mere awareness of

the disparate impact of a decision does not subject it to strict scrutiny. *See Washington v. Davis*, 426 U.S. 229, 239 (1976). But at the same time, this Court should make clear that the Constitution does not strictly limit or prohibit consideration of such consequences either. The potential disparate distribution of the benefits and burdens of government action is naturally one of the considerations public officials take into account in making policy decisions, with the legitimate goal of ensuring that those burdens and benefits are not concentrated along racial or other lines. Yet, the logic of petitioner's Equal Protection claim in this case would draw into serious question the constitutionality of public officials' attempts to avoid or minimize policies that exacerbate the long-standing inequality that continues to divide the nation.

Thus, for example, petitioners' position would subject to strict scrutiny a public housing department's consideration of the effect on racial segregation of the location for a new development, and would call into question the United States Sentencing Commission's recent decision to amend the federal sentencing guidelines to reduce the crack-to-powder cocaine ratio in part because of its finding that "[t]he current severity of crack cocaine penalties mostly impacts minorities." U.S. SENTENCING COMMISSION, REPORT TO THE CONGRESS, COCAINE AND FEDERAL SENTENCING POLICY 8 (May 2007). And it would subject to strict scrutiny public efforts to

minimize racial disparities in access to health care,[11] the incidence of serious diseases,[12] or infant mortality,[13] which necessarily entail race-conscious decisionmaking and adjustment of resources in a way that may disadvantage some who benefit under the current system.

2. This Court has previously recognized that such facially neutral, race-conscious efforts do not warrant strict scrutiny.

In the election law context, this Court has held that "[s]trict scrutiny does not apply merely because redistricting is performed with consciousness of race.

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[11] *See*, *e.g.*, U.S. DEP'T OF HEALTH AND HUMAN SERVS., HEALTH RES. AND SERVS. ADMIN., ADDRESSING RACIAL AND ETHNIC DISPARITIES IN THE CONTEXT OF MEDICAID MANAGED CARE: A SIX-STATE DEMONSTRATION PROJECT (2004), *available at* ftp://ftp.hrsa.gov//financeMC/HRSA-Disparities-in-MC-Report.pdf (describing race-conscious efforts to reduce racial disparities in access to health care).

[12] *See*, *e.g.*, U.S. Ctrs. for Disease Control & Prevention, *Racial Disparities in Nationally Notifiable Disease—United States, 2002*, MORBIDITY AND MORTALITY WEEKLY REPORT, Jan. 14, 2005, *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5401a4.htm (documenting substantial racial disparities in incidence of serious infectious diseases and urging directed action to reduce the disparities).

[13] *See*, *e.g.*, U.S. CTRS. FOR DISEASE CONTROL & PREVENTION, OFFICE OF MINORITY HEALTH & HEALTH DISPARITIES, ELIMINATING RACIAL & ETHNIC HEALTH DISPARITIES, available at http://www.cdc.gov/omhd/About/disparities.htm (identifying reduction of the racial disparity in infant mortality as one of six areas targeted by the agency for special action, and noting that "[i]n 2000, the black-to-white ratio in infant mortality was 2.5" and "widening").

Nor does it apply to all cases of intentional creation of majority-minority districts. Electoral district lines are 'facially race neutral,' so a more searching inquiry is necessary before strict scrutiny can be found applicable in redistricting cases than in cases of 'classifications based explicitly on race.'" *Bush v. Vera*, 517 U.S. 952, 958 (1996) (plurality opinion) (citations omitted) (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 213 (1995)); *see also Shaw v. Hunt*, 517 U.S. 899, 905 (1996).

Members of this Court have reached the same conclusion with respect to race-neutral attempts to promote integration and racial diversity in public education. Justice Kennedy has explained that "strategic site selection of new schools . . . [or] tracking enrollments, performance, and other statistics by race," undertaken with "the goal of bringing together students of diverse backgrounds and races," are all "mechanisms [that] are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible." *Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concurring); *see also* Danielle Holley & Delia Spencer, *The Texas Ten Percent Plan*, 34 HARV. C.R.-C.L. L. REV. 245, 252-59 (1999) (discussing Texas's "Ten Percent Plan," a facially neutral policy enacted by a legislature conscious that the plan would be likely to improve racial diversity at state universities). And Justice Thomas has recognized that "the adoption of [a particular] admissions method" to "achieve [a] vision of [a] racially aesthetic student body" may be permissible, despite its clear

racial purpose, so long as it avoids "the use of racial discrimination." *Grutter v. Bollinger*, 539 U.S. 306, 361-62 (2003) (Thomas, J., concurring in part and dissenting in part).

Finally, a majority of the Court has concluded that strict scrutiny likewise should not apply to race-neutral measures taken to improve minority participation in government contracting, an area closely akin to the public employment at issue in this case. In *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 519 (1989), Justice O'Connor—writing for herself, the Chief Justice, Justice White, and Justice Kennedy—explained that even when a public entity lacks the justification that would warrant taking race-based action that would invoke strict scrutiny, it nonetheless may take action for the specific purpose of "increas[ing] the opportunities available to minority business without classifying individuals on the basis of race." *Id*. at 509-10 (plurality opinion).

One such permissible measure, the plurality explained, was taking steps to eliminate "barriers" that "may be the product of bureaucratic inertia more than actual necessity, and may have a disproportionate effect on the opportunities open to new minority firms." *Croson*, 488 U.S. at 510 (plurality opinion). This includes not only removing government-imposed barriers but also enacting legal rules to prohibit private discrimination. *Id*. (plurality opinion). And this prohibition, the plurality continued, may extend not simply to private *intentional* discrimination, *see id*. (noting that the city "may also enact to prohibit discrimination in the provision of credit or bonding by local suppliers and banks") (plurality opinion), but also to business

practices that have an unwarranted disparate impact: "Business as usual," the plurality explained, "should not mean business pursuant to the unthinking exclusion of certain members of our society from its rewards." *Id*. (plurality opinion).

Although disagreeing on other aspects of the case, four other Justices also took the view that strict scrutiny would not apply to race-neutral efforts to increase minority contracting.[14]

3. Title VII's proscription against employment practices that have an unjustified disparate impact is precisely the kind of race-neutral action to remove unnecessary barriers to minority advancement that a majority of the Court endorsed in *Croson*. Moreover, declining to subject such action to strict scrutiny is consistent with the basic purposes and principles of the Equal Protection Clause.

First, facially neutral action, taken with some consciousness of race, does not pose the same risk of individual injury as overt racial classifications. At most, it involves consideration of race "in a general way and without treating" any individual "in a different fashion solely on the basis of a systematic,

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[14] The three dissenting Justices concluded that strict scrutiny should not apply even to express racial classifications, so long as they were undertaken for a remedial purpose. *Croson*, 488 U.S. at 551-53 (Marshall, J., dissenting). While Justice Scalia disagreed with that position, he nonetheless stated that a public entity "can, of course, act 'to undo the effects of past discrimination' in many permissible ways that do not involve classification by race." *Id*. at 526 (Scalia, J., concurring in the judgment).

individual typing by race." *Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concurring). Such aggregate-level racial considerations thus do not present the risk of stigmatizing posed by individual-level actions that "reduce [people] to racial chits." *Id.* at 2797 (Kennedy, J., concurring); *see also Vera*, 517 U.S. at 1008 (Stevens, J., dissenting) (noting distinction between racial classifications that "harm[] an individual or set of individuals because of their race" and the "more diffuse" harm caused when districting "lines are drawn based on race"). The attenuated risk of race-based harm to individual citizens is constitutionally significant, for the Equal Protection Clause "protect[s] *persons*, not *groups*." *Adarand*, 515 U.S. at 227 (emphasis in original).

Second, avoiding a disparate impact reduces the chance that individual citizens will be deprived of government benefits, or subjected to burdens, on the basis of their race. As noted above, preferring one employment test over another does not determine the success of any particular individual on the basis of his race. So long as the test is job-related, individuals of all races should have a fair chance at advancement, and none should feel that they have been disadvantaged because of their race, particularly when an employer could have chosen the less discriminatory test initially (if by nothing more than sheer happenstance). This is markedly different from racial classifications that have an open, direct, and concrete effect on individuals' opportunities because of their race. To the extent that there is a cost to be borne by governmental efforts to avoid unnecessary barriers to minority advancement, the cost is spread more diffusely and falls less heavily on

any given individual. *Cf. Wygant*, 476 U.S. at 280-83 (plurality opinion) (noting constitutional preference for race-based action that minimizes individualized burdens on innocent third parties).

Finally, unlike racial classifications, a decision to avoid an unnecessary disparate impact is significantly less likely to be founded in invidious animus. *Cf. Johnson v. California*, 543 U.S. at 505 (noting that strict scrutiny is applied to racial classifications because "[r]acial classifications raise special fears that they are motivated by an invidious purpose").

4. *Amici* do not suggest that strict scrutiny should *never* apply to a neutral action undertaken for a race-conscious purpose.

When the racial purpose motivating a facially neutral action is invidious, the policy is subject to strict scrutiny and should be held unconstitutional. *See, e.g.*, *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960) (finding a redistricting measure unconstitutional on facts leading to the "irresistible" conclusion "that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote"); *Rogers v. Lodge*, 458 U.S. 613, 622 (1982) (overturning an election system "maintained for the invidious purpose of diluting the voting strength of the black population"); *Hunter*, 471 U.S. at 232 (holding unconstitutional a felon disenfranchisement law whose "purpose to discriminate against all blacks . . . was a 'but-for' motivation").

Moreover, strict scrutiny is also appropriate when a decision is unduly influenced by race. In the voting context, for example, the Court has recognized that while race-conscious districting is not automatically subject to strict scrutiny, a "constitutional wrong occurs when race becomes the 'dominant and controlling' consideration." *Shaw v. Hunt*, 517 U.S. 899, 905 (1996). In other words, strict scrutiny applies when "legitimate" considerations are "subordinated to race." *Vera*, 517 U.S. at 959 (plurality opinion) (internal quotation marks omitted) (citing *Miller*, 515 U.S. 900, 916 (1995)). In such cases, the basic risks justifying strict scrutiny—including the risk of invidious action, stigmatization, and racial polarization—are sufficiently heightened that strict scrutiny should apply.

Here, Title VII's disparate impact provision obviously does not compel public employers to act with animus. Indeed, any action taken for the purpose of disadvantaging specific individuals because of their race would violate the statute itself. *See* U.S. Br. 15-18. Nor does Title VII require employers to make race the predominant consideration in any hiring, promotion, or other employment decision. To the contrary, Title VII expressly subordinates race to other legitimate considerations by, for example, allowing employers to maintain practices with even marked disparate impacts when consistent with business necessity. 42 U.S.C. § 2000e-2(k). Moreover, Title VII expressly disavows any requirement of racial balance, *id.* § 2000e-2(j), and forbids employers to adjust test scores on the basis of race, *id.* § 2000e-2(l).

Of course, an individual employer might actually be motivated by animus or unreasonably elevate race above other considerations. In that circumstance, the disadvantaged employee would have a potentially viable Equal Protection claim against the employer, to the extent the action was not in fact required to comply with Title VII.[15] However, in that circumstance, the constitutional claim would be unnecessary as Title VII itself would make the action illegal. *See* U.S. Br. 15-18.

5. Finally, applying strict scrutiny to all forms of neutral, but race-conscious, conduct could hamstring Congress in the exercise of its constitutional responsibility to enforce the guarantees of the Fourteenth Amendment through "appropriate legislation." U.S. CONST. amend. XIV, § 5. This Court has recognized that this express delegation of authority necessarily affords Congress considerable leeway to determine what steps are necessary to "deter[] or remed[y] constitutional violations." *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997). And it has previously endorsed legislation proscribing disparate impact as generally appropriate to enforce the requirements of the Equal Protection Clause. *Tennessee v. Lane*, 541 U.S. 509, 520 (2004). To now hold that such legislation must itself survive strict

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[15] If the action was required by Title VII—because, for example, the current practice had an unlawful disparate impact—then the employer's discriminatory intent would not be the legal cause for the challenged conduct and compliance with Title VII would not be rendered unconstitutional by the employer's subjective state of mind. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285-87 (1977).

scrutiny would strip Congress of the broad discretion Section 5 intended to afford it and deprive the nation of a necessary and effective means of ensuring equality of economic and social opportunity in America.

* * * *

Petitioners' constitutional claims depend on their assertion that attempting to avoid a disparate impact triggers strict scrutiny under the Equal Protection Clause; they do not claim that such action would fail any lesser degree of constitutional scrutiny. Because petitioners' premise is incorrect, the Court should reject any suggestion that Title VII's disparate impact provision transgresses constitutional boundaries by requiring conduct that is prohibited by the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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